The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JOHN H. SCHNEIDER, DONALD L. CREVIER, STEVEN AUSNIT, MICHAEL McMAHON, LAWRENCE SHARE, ERIC P. PLOURDE, and ROBERT E. HOGAN

Appeal No. 2006-1232
Application No. 09/761,500
Technology Center 3700

Before MURRIEL E. CRAWFORD, JENNIFER D BAHR, and STUART S. LEVY, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

John H. Schneider et al. (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1-4. We have jurisdiction over this appeal under 35 U.S.C. § 6.

We AFFIRM.

THE INVENTION

Appellants' invention is a tamper-evident resealable package. The package includes a zipper provided with a slider. The slider is either contained in or blocked from movement along the zipper by package material which must be removed or ruptured to permit operation of the slider or to provide access to the package contents (Specification 2). Claim 1, the only independent claim in this application, is representative of the invention and reads as follows:

> 1. A reclosable package having a top, bottom, and sides, said package comprising:
>
> a first wall and a second wall opposite to said first wall;
>
> a first zipper profile having a first interlocking member and a first flange portion, said first flange portion having a distal end, said first interlocking member being positioned proximate to said distal end of said first flange portion, a portion of said first flange portion being attached to said first wall along a line extending substantially from side to side of said package and said distal end of said first flange portion being free of attachment to said first wall;
>
> a second zipper profile having a second interlocking member engageable with said first interlocking member and a second flange portion, said second flange portion having a distal end, said second interlocking member being positioned proximate to said distal end of said second flange portion, a portion of said second flange portion being attached to said second wall along a line

> extending substantially from side to side of said package and said distal end of said second flange portion being free of attachment to said second wall; and
>
> at least one of said walls and flange portions forming a wall segment beyond the attachment line of said wall to its associated flange portion, said segment extending over said profiles' interlocking members and being sealed to an opposite one of said segments thereby forming a seal, said seal providing a frangible connection to provide a tamper-evident feature for said reclosable package.

THE EVIDENCE

The Examiner relies upon the following as evidence of unpatentability:

Thompson	US 5,224,779	Jul. 06, 1993
Thomas	US 5,713,669	Feb. 03, 1998
Ausnit	US 6,131,369	Oct. 17, 2000
Tilman	US 6,412,254 B1	Jul. 02, 2002 (Dec. 16, 1999)

THE REJECTIONS

Appellants seek review of the Examiner's rejections of claim 1 under 35 U.S.C. § 102(b) as being anticipated by Thompson, claims 1-4 under 35 U.S.C. § 102(e) as being anticipated by Tilman, and claims 1-4 under 35 U.S.C. § 103(a) as being unpatentable over Tilman in view of Thomas, unpatentable over Ausnit in view of Thomas, and unpatentable over Thomas.

The Examiner provides reasons in support of the rejections in the Examiner's Answer (mailed October 11, 2005). Appellants present opposing arguments in the Brief (filed July 7, 2005).[1]

OPINION

The Thompson rejection

We turn our attention first to the rejection of claim 1 as being anticipated by Thompson. In making this rejection, the Examiner relies on the embodiment of Fig. 4 of Thompson. The deficiency of Thompson lies in the positioning of the interlocking reclosure strips 17, 18 at ends of the lips 26, 27 that are secured to bag panels 10, 11, rather than at ends free of attachment to the bag panels, as required to meet Appellants' claim 1.

Appellants point out that Thompson (Fig. 4) discloses the interlocking members (interlocking reclosure strips 17, 18) being positioned on the flanges (lips 26, 27 of zipper strip 23) at ends which are opposite from the ends (near folded nose portion 25) which are free of attachment to the first and second walls (Br. 5). Therefore, as correctly noted by Appellants (*id.*),

[1] Compliance of the specification with 37 CFR § 1.75(d)(1) is a petitionable matter (MPEP § 1002.02(c) – item 4), not an appealable matter (MPEP § 1201). Accordingly, we will not review the first issue raised on page 4 of the Brief.

Thompson (Fig. 4) cannot disclose both "said first [or second] interlocking member being positioned proximate to said distal end of said first [or second] flange portion" and "said distal end of said first [or second] flange portion being free of attachment to said first [or second] wall," as called for in claim 1. Appellants' argument is well taken and lacks response by the Examiner. The rejection cannot be sustained.

The Tilman rejections

We address together the rejections of claims 1-4 as being anticipated by Tilman and as being unpatentable over Tilman in view of Thomas, as the Examiner's rationale is essentially the same in both rejections.

As best seen in Fig. 2, Tilman discloses a resealable package having tamper-evident structure and a zipper-type closure mechanism 14, the closure mechanism including first and second interlocking profiles 130, 131 closable by slider device 160 (col. 6 – not shown in Fig. 2). The interlocking profiles 130, 131 include bonding strips 132, 142 and first and second interlocking closure members 134, 144 projecting from base strips 133, 143. The bonding strips 132, 142, respectively, are secured to the first and second panel sections 19, 20, respectively, of the package (col. 5, ll. 21-24). The closure members 133, 134, which respond to the first and second interlocking members recited in claim 1, are positioned proximate distal ends of the profiles 130, 131 free of attachment to the first and second panel sections 19, 20. In the embodiment of Fig. 2, Tilman illustrates and describes a tamper-

evident structure 180 formed by extending the first and second panel sections 19, 20 beyond the closure mechanism and folding the panel sections 19, 20 at a first closed edge 18. Tilman's tamper-evident structure 180 is typically penetrated by either cutting along the closed edge 18 or by tearing the closed edge 18 from the package (col. 7, ll. 34-36).

Appellants contend Tilman does not anticipate claim 1 because the tamper-evident feature described in Tilman's Fig. 2 embodiment does not comprise one segment extending over the zipper profiles and being *sealed* to an opposite segment thereby forming a frangible seal, as called for in Appellants' claim 1. As explained more fully below, the Examiner relies on the teachings of Thomas to address the tamper-evident seal limitation of claim 1. Appellants further contend the packages of Tilman and Thomas are manufactured by such completely different processes and have such widely different configurations that "their combination with regard to certain features would inevitably result in conflicts of purpose" (Br. 6).

The Examiner, noting Tilman's disclosure (col. 7, ll. 46-48)) that "[i]n some embodiments, tamper-evident structures can use principles described in [the Thomas patent], incorporated by reference," finds a teaching in Tilman of an alternate tamper-evident structure embodiment wherein the first closed edge is formed by a peelable seal rather than a fold. In making the anticipation rejection, the Examiner contends Tilman's incorporation by reference to the tamper-evident structure principle described in Thomas (Thomas, col. 3, ll. 60-67; col. 4, ll. 37-42) constitutes a disclosure by Tilman

of an alternate embodiment of the tamper-evident structure 180 wherein the upper ends of the package panel sections 19, 20 are secured to one another by a peelable seal rather than a fold. In the alternative, in making the obviousness rejection, the Examiner contends the combined teachings of Tilman and Thomas would have suggested such an alternate embodiment to arrive at the claimed subject matter (Answer 4).

Thomas discloses a tamper-evident feature for a bag having a zipper with a slider, wherein the tamper-evident feature includes first and second upstanding panels 36, 38 joined to each other at their upper edges to form a pocket in which the slider and zipper are captured (col. 3, ll. 60-64). The upper edges of panels 36, 38 may be joined to each other by thermal fusion or by integrally forming the upper edges with each other (col. 3, ll. 64-67). To permit access to the bag, Thomas discloses three alternative embodiments of a one-time breakable seal formed in the pocket. One embodiment consists of a single line of weakness formed at the juncture of the uppermost edges of panels 36, 38 (col. 4, ll. 34-36). A second embodiment consists of parallel lines of weakness or perforations 40 (col. 4, ll. 23-26). A third embodiment consists of a peelable seal formed by detachably connecting the inner surfaces of panels 36, 38 with a tacky adhesive-like substance well known in the art (col. 4, ll. 37-42).

Both the Examiner's theory of anticipation and the Examiner's alternate theory of obviousness are well founded. The information incorporated by reference into a patent is as much a part of the patent as if the

text were repeated in the patent. *See* MPEP § 2163.07(b). Accordingly, the embodiments of the tamper-evident structure taught by Thomas and incorporated by reference into the Tilman patent are part of the disclosure of Tilman. As such, Tilman discloses an embodiment of the tamper-evident structure 180 wherein the upper edges of the panel sections 19, 20 are joined by a peelable seal and thus anticipates the subject matter of claim 1. In the alternative, Thomas' disclosure of joining the uppermost edges of the panels with a peelable seal as an alternative to integral formation of the uppermost edges with each other would have suggested to the skilled artisan replacing Tilman's fold at first closed edge 18 with a peelable seal. Tilman's disclosure that the principles of tamper-evident structures described by Tilman can be used in some embodiments of Tilman's package belies any notion that the manufacturing processes or configurations of Tilman and Thomas are so different that their combination with regard to the tamper-evident feature would inevitably result in conflicts of purpose, as urged by Appellants (Br. 6).

For the reasons set forth above, the rejections of claim 1, and dependent claims 2-4 which Appellants have not separately argued, as being anticipated by Tilman and as being unpatentable over Tilman in view of Thomas are both sustained.

The Ausnit in view of Thomas rejection

As best seen in Figs. 4 and 5, Ausnit discloses a resealable package having a zipper 16 with a slider 30. The zipper and slider are captured within a pocket formed by extensions of package walls 53, 55 secured at their upper ends with a tamper-evident seal 68 and provided with perforations 54. To open the package 50, the user tears off the tamper-evident seal 68 along the perforations 54 and moves the slider to open the zipper interlocking members (col. 4, ll. 40-44).

The Examiner finds that Ausnit discloses the invention recited in claims 1-4 except that Ausnit discloses lines of perforation, rather than a frangible seal, to access the slider (Answer 5). Appellants do not contest this finding.

The Examiner, apparently relying on the disclosure of Thomas (col. 4, ll. 21-42), contends that it would have been obvious to substitute a peelable seal (at 68) in Ausnit for the lines of perforation 54 to provide access to the slider, "because these two slider accessing means were art-recognized equivalents at the time the invention was made" (Answer 5). Appellants do not contest the Examiner's finding that a peelable seal securing the uppermost edges of the package walls and lines of perforation were art-recognized equivalent forms of one-time breakable seals for providing slider access.

Appellants instead point out that Thomas' upstanding panels 36, 38 are separate portions of web material thermally fused to the body panels 12, 14

and argue there is nothing in the prior art to teach the combination of Ausnit and Thomas (Br. 7).

That Thomas' pocket is formed by upstanding panels 36, 38 thermally fused to body panels 12, 14 rather than unitarily formed as one piece with the body panels is of no moment. Appellants' claims do not require one-piece construction of the walls and wall segments, as explained more fully below. In any event, Ausnit does disclose unitary one-piece formation of the walls and the wall segments forming the pocket. The differences in panel construction between Ausnit and Thomas are not of such a nature as to have discouraged the substitution of Ausnit's perforations 54 with a peelable seal at 68, an art-recognized equivalent to the perforations, as evidenced by Thomas.

For the reasons discussed above, Appellants' arguments fail to persuade us that the Examiner erred in rejecting claims 1-4 as being unpatentable over Ausnit in view of Thomas. The rejection is sustained.

The Thomas rejection

We turn finally to the rejection of claims 1-4 as being unpatentable over Thomas. The examiner finds that Thomas discloses all the features claimed except for the wall segments (upstanding panels 36, 38) being formed from package walls 12, 14 (Answer 5). The Examiner contends that it would have been obvious to a person having ordinary skill in the art at the time the invention was made to form the wall segments of Thomas from the

package walls, "since it has been held that forming in one piece an article which has formerly been formed in two pieces and put together involves only routine skill in the art. *Howard v. Detroit Stove Works*, 150 U.S. 164 (1893)" (*id.*).

Appellants allege, without explanation, that the modification proposed by the Examiner is not an obvious variation by way of forming in one piece an article formerly formed in two pieces and put together (Br. 8).

Thomas discloses first and second panels 36, 38 "integrally formed" with first and second body panels 12, 14, respectively, with lowermost strips 36a, 38a of the first and second upstanding panels 36, 38, respectively, thermally bonded to an outer surface of the body panels 12, 14 (col. 3, ll. 32-42).

Claims 1-4 do not require formation of the wall segments as *one piece* with the first and second walls. Claim 1 merely requires at least one of the walls and flange portions to form a wall segment beyond the attachment line of said wall to its associated flange portion and claim 3 recites first and second segments extending from the first and second walls. Thomas' first and second panels 36, 38 are integrally formed with and extend from the first and second body panels 12, 14. This arrangement meets the limitation in claim 1 that the wall (body panel 12 or 14) form a wall segment (panel 36 or 38) beyond the attachment line of the wall (body panel 12 or 14) to its associated flange portion (flange 26 or 30) and the limitation in claim 3 that the segments (panel 36 or 38) extend from the walls (body panel 12 or 14).

We therefore conclude that the claimed feature perceived by the Examiner to be lacking is in fact disclosed by Thomas. As Appellants have not alleged that any other claimed feature is not taught by Thomas, we sustain the Examiner's rejection of claim 1, and claims 2-4 which Appellants have not argued separately from claim 1, as being unpatentable over Thomas.[2]

SUMMARY

The rejection of claim 1 as being anticipated by Thompson is reversed. The rejections of claims 1-4 as being anticipated by Tilman, unpatentable over Tilman in view of Thomas, unpatentable over Ausnit in view of Thomas, and unpatentable over Thomas are all sustained. Consequently, the decision of the Examiner to reject claims 1-4 is AFFIRMED.

[2] A disclosure that anticipates under 35 U.S.C. § 102 also renders the claim unpatentable under 35 U.S.C. § 103, for "anticipation is the epitome of obviousness." *Jones v. Hardy*, 727 F.2d 1524, 1529, 220 USPQ 1021, 1025 (Fed. Cir. 1984). See also *In re Fracalossi*, 681 F.2d 792, 794, 215 USPQ 569, 571 (CCPA 1982); *In re Pearson*, 494 F.2d 1399, 1402, 181 USPQ 641, 644 (CCPA 1974).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a). *See* 37 CFR § 1.136(a)(1)(iv).

AFFIRMED

MURRIEL E. CRAWFORD)
Administrative Patent Judge)
)
)
)
)
JENNIFER D BAHR) BOARD OF PATENT
Administrative Patent Judge) APPEALS
) AND
) INTERFERENCES
)
)
)
STUART S. LEVY)
Administrative Patent Judge)

DAY PITNEY LLP
7 TIMES SQUARE
NEW YORK, NY 10036-7311

JDB/lg